

Kumar (Migration) [2020] AATA 4138 (28 July 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sanjeev Kumar
CASE NUMBER:	1921760
HOME AFFAIRS REFERENCE(S):	BCC2019/1575364
MEMBER:	Helen Kroger
DATE:	28 July 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 28 July 2020 at 9:21am

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) – Subclass 500 (Student) – relationship to primary applicant ceased – genuine and continuing relationship – divorce proceedings finalised – threats of family violence – financial hardship – decision under review affirmed

LEGISLATION

Migration Act 1958, s 116
Migration Regulations 1994

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 7 August 2019 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that the visa holder's dependent Student (subclass 500) visa was based on a circumstance that no longer exists. Relevantly to this consideration, that the visa holder's relationship with the primary visa holder no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 22 July 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's relative, Mrs Aarti Garg. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
4. The applicant provided the Tribunal with a copy of the delegate's decision for the purpose of its consideration.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a), namely *that the decision to grant the visa was based, wholly or in part, on a particular fact or circumstance that is no longer the case or that no longer exists*. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

7. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
8. The review applicant, Mr Kumar, was granted a dependent student (subclass 500) visa on 3 April 2018, on the basis that he was in a relationship with the primary visa holder, Ms Maninder Jit Kaur. The delegate issued a Notice of Intention to Consider Cancellation (NOICC) on the 25 June 2019, inviting Mr Kumar to comment on information before the delegate that he was no longer in a relationship with his wife. In his response to the delegate on 3 July 2019, the review applicant does not dispute that the relationship has ceased and described the circumstances from the time the parties arrived in Australia in April 2018 up to the period of separation shortly thereafter. At the hearing, the alleged breach was put to the applicant and reference made to the delegate's decision record that indicated that Mr Kumar's relationship with the primary visa holder had ceased. Mr Kumar was invited to comment on these circumstances and did not dispute that his relationship with the primary visa holder had ceased.

9. On the evidence before the Tribunal, namely the applicant's admission during the hearing and his response to the NOICC, the Tribunal finds that the applicant's relationship with the primary visa holder has ceased.
10. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

11. Having found that the applicant has not complied with a condition of the visa, the Tribunal must consider whether the visa should be cancelled.
12. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
13. The Tribunal has considered the applicant's evidence provided at the hearing along with the documentation provided to the delegate. The information provided to the Tribunal at the hearing has been considered by the Tribunal in its exercise of discretion as outlined above.

14. The purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia

15. Mr Kumar travelled to Australia in April 2018, to accompany his wife, Ms Maninder Jit Kaur, on the basis that as a secondary visa holder, he was in a genuine and continuing relationship with Ms Kaur who was the primary visa holder. Ms Kaur had been granted a student visa for the purpose of studying in Australia. Mr Kumar explained to the Tribunal that the parties had married in the previous year and that she wished to study in Australia. He indicated that he and his parents paid for the tuition fees and associated travel and relocation costs to enable Ms Kaur's study and that together they came to Australia. Mr Kumar told the Tribunal at the hearing that their relationship became difficult immediately after their arrival in Australia, that Ms Kaur wanted Mr Kumar to provide the same 'things' that she was accustomed to in India, notwithstanding the higher cost of living in Australia and that she continued to demand things that he could not afford and in his response to the delegate's NOICC, indicated that *'he eventually came to know that she had a boyfriend'*.
16. Mr Kumar's relative, Mrs Aarti Garg, who resides in Sydney, invited and paid for the parties to visit her in Sydney, purchasing airline tickets for them both, in an endeavour to help her brother deal with the relationship difficulties. On the day they were to leave, Ms Kaur refused to travel and remained in Perth whilst Mr Kumar flew to Sydney, where he has since lived with his sister, who now financially provides for him and supports him. Mr Kumar told the Tribunal that he continued to pay bills for Ms Kaur and that she filed for divorce in India, so that she could receive a payment, according to the Indian dowry system. The divorce was finalised in December 2019 and the review applicant's family made a payment to Ms Kaur.
17. Mr Kumar told the Tribunal that he wanted to stay in Australia as he wanted to study cookery so that he could learn to become a chef. He is 35 years of age and claims that he worked for Telstra in India for a period of 10 years and that he ran a small grocery shop for 15 years before coming to Australia. He indicated that he sold everything before coming to Australia and that he has no money left and nothing to return to.
18. The Tribunal has carefully considered the evidence provided by the applicant and the reasons he submitted regarding his wish to stay so that he can study cooking and the

evidence submitted to the delegate and the applicant's oral submission to the Tribunal explaining the breakdown in the relationship that was finalised with a divorce in December 2019. Whilst the Tribunal is not unsympathetic with the applicant's interest in commencing study in Australia following a marriage breakdown that he claims was initiated by Ms Kaur, the Tribunal has considered the purpose of Mr Kumar's visa, and that this visa was granted so that he could accompany the primary visa holder to Australia and that this relationship has now ceased. Given the circumstances as outlined above, I give this no weight in the applicant's favour.

19. The extent of compliance with visa conditions

20. There is nothing before the Tribunal to indicate that the applicant has breached other conditions of the visa. The Tribunal expects that a visa holder will generally adhere to the conditions on their visa and the Tribunal is mindful of the significance of the breach. As such, the Tribunal gives minimal weight to the fact that there appears to be no additional breaches.

21. *The degree of hardship that may be caused (financial, psychological, emotional or other hardship)*

22. The Tribunal invited the applicant to comment on any potential hardships that may be caused should his visa be cancelled and be required to return to India. The applicant submitted to the Tribunal through his oral evidence at hearing, that he held grave concerns for his safety should he be required to return to India, as Ms Kaur's family lived in close proximity to his parents. He claimed that Ms Kaur, and her family, with particular reference to her brother, had made numerous threats against him, including the threat that they were going to kill him. He claims that in the divorce action/dowry application filed by Ms Kaur, that she had indicated that his parents had 'beaten her' and that they had taken money from her. He explained that she made these alleged false accusations to increase her claim for money from them. In explaining what allegedly transpired between the parties, Mr Kumar indicated that he had not spoken to Ms Kaur for around 2 years, and that the divorce had been finalised, including the financial arrangements that were associated with the divorce and that there was no outstanding legal action against either him or his parents. Mr Kumar's sister supported these claims in her testimony during the hearing, explaining that her parents would no longer pay Ms Kaur's tuition fees after she separated from Mr Kumar in 2018. She claimed that Ms Kaur's family, who live near Mr Kumar's parents, became threatening and abusive and that Ms Kaur filed a dowry case in India with the intent of getting money and that her father was required to pay 800,000 rupees, the equivalent of around AUD\$15,000. The divorce was finalised in December 2019.
23. The Tribunal has given considerable regard to the above claims and that the applicant Mr Kumar, is fearful to return due to the alleged abuse and threats he has received. Whilst the Tribunal has made no credibility finding on the nature of these threats, it accepts that the relationship between the parties became acrimonious and this was in some part due to the financial claims made by Ms Kaur against both Mr Kumar and his parents. In considering Mr Kumar's claims of threat and fear for his safety, the Tribunal has had regard to Mr Kumar's evidence that he has had no contact with Ms Kaur for two years and that the divorce and associated money claims were finalised in December 2019. Given that Mr Kumar has had no contact with Ms Kaur for two years and that the personal threats he alleges relate to the time in 2018 when the parties were first separated, and that the subsequent claims of abuse are those that were allegedly directed to his parents in the lead up to the dowry settlement, the Tribunal finds that whilst these threats were perceived as real at that time, there is limited evidence before the Tribunal to indicate that these threats are continuing and ongoing and would prevent Mr Kumar from returning home safely. Whilst the Tribunal accepts that the circumstances may have led to a continuing unpleasant and hostile relationship between the

families, it has considered Mr Kumar's claims that he would be unsafe should he return to India. The Tribunal has regard to the safety issues raised by the applicant as outlined above and gives little weight in favour of the applicant.

24. The applicant explained at hearing that he had run a grocery business for 15 years and had worked with a private company that he named as Telstra for a period of ten years before coming to Australia. He told the Tribunal that he sold everything he had to come to Australia and that together with his parents, that they funded Ms Kaur's tuition fees. He indicated that he worked in a couple of 'car wash's' and Indian restaurants and said that due to stress and anxiety caused by his current circumstances, including the poor health of his parents, his visa issues and the treatment received from his former wife, that he is unable to work and is financially dependent on his sister who he lives with in Sydney. He indicated that his brother supports his parents in India and that he doesn't have any money to support himself in India as he has no money left. The Tribunal has considered the economic circumstances as described by the applicant, the financial support provided by his sister in Australia and his current dependency on this support in the context of his economic independence prior to coming to Australia. There is no evidence before the Tribunal to indicate that the applicant would be prevented from re-establishing his financial independence in India, not withstanding the fact that he has spent his savings on coming to Australia to support his former wife or that his sister would not continue to help him. Accordingly, the Tribunal gives the economic circumstances as described by Mr Kumar little weight in favour of the applicant.
25. The applicant claimed that his current situation was all too stressful for him to return to India. In addition to the above claims, he told the Tribunal that his parents were ill as a result of the behaviour of his former wife and that his mother was in hospital in a serious condition. His 80 year old father suffered a heart attack one month ago, is subject to epileptic seizures and his brother has become the carer for them. The Tribunal has sympathy with the anxiety he has expressed and concern shown for his parents and finds that his parents health will not be further adversely effected should he return to India and as such, gives this aspect little weight in favour of the applicant.
26. For these reasons as outlined above, the Tribunal finds that the applicant could return to his home country without suffering further financial hardship whilst finding that it is not unusual for an applicant to be disappointed or upset should he be required to leave Australia. Accordingly the Tribunal finds that the applicant is not subject to any emotional or psychological hardship, outside what would be considered normal for any applicant if required to leave the country. The Tribunal finds that the applicant has a genuine concern for his safety and accordingly gives this some weight in favour of the applicant.

27. *Circumstances in which the ground for cancellation arose.*

28. The applicant was entitled to the visa as the spouse of Ms Kaur who was the primary holder of the student visa. The applicant and Ms Kaur were married in 2017 prior to coming to Australia in April 2018. Shortly after arriving in Australia, the parties separated and lived permanently apart from April 2018. The reasons for the separation have been fully canvassed above and the applicant in his various submissions, indicated that Ms Kaur's behaviour significantly changed after their arrival in Australia. He indicated that he became aware that she had a boyfriend and that she was motivated by money and his parents paying for her to study in Australia. He claims that she threatened him that she would get his visa cancelled if he didn't give her the money she demanded. The applicant explained to the Tribunal that he tried to sort out the relationship and the applicant's sister, Mrs Garg, told the Tribunal at the hearing that she invited and paid for them both to visit her in Sydney in April 2018, in an endeavour to help. Ms Kaur refused to travel to Sydney, notwithstanding that an airline ticket had been purchased for her, with Mr Kumar's parents also getting involved, and

speaking to Ms Kaur's parents. No resolution could be found to the matter and Ms Kaur filed for a divorce in India. It was claimed that she sought a divorce in India because of the dowry system which provided her an opportunity to seek compensation, as she wanted money to fund her in Australia.

29. The Tribunal has carefully considered the circumstances in which the cancellation arose and is sympathetic with the actions of the applicant in trying to resolve the issues in the relationship, problems that he was not responsible for and accordingly gives some weight to this aspect in favour of the applicant.

30. *Past and present behaviour of the applicant to the Department*

31. There is nothing before the Tribunal to indicate that the applicant has not cooperated with the Department or the Tribunal in his dealings and gives this some weight in favour of the applicant and not cancelling his visa.

32. *Consequential cancellations under s.140*

33. There is no evidence that there would be consequential cancellations if the applicant's visa is cancelled and I give this no weight.

34. *Mandatory legal consequences*

35. There would be mandatory legal consequences, upon cancellation of the visa and the Tribunal notes that the visa under consideration has already expired. The applicant would become unlawful, and subject to the possibility of detention, although he would also be eligible to apply for a bridging visa. The applicant would be subject to the provision of s.48 of the Act which limits the application for other visa the applicant would otherwise be entitled to apply for whilst in Australia. The Tribunal has considered the restrictions this would impose upon the applicant and as such gives this some weight in favour of the applicant.

36. *Any international obligations*

37. There is nothing before the Tribunal to indicate that there are any international obligations to consider.
38. The Tribunal has carefully assessed the relevant factors, both individually and cumulatively, including the evidence raised by the applicant and his sister during the hearing. The cancellation of the applicant's visa is based on the relationship breakdown, as the applicant is no longer a member of Ms Kaur's family unit, as required to be the holder of the dependent student visa. Based on the evidence before the Tribunal, namely the evidence submitted to the delegate and the applicant's testimony to the Tribunal, along with his sister's, the relationship broke down in April 2018, shortly after they arrived in Australia. In consideration of whether discretion should be exercised in relation to the cancellation of the visa, the Tribunal has given limited weight to the factors that have been assessed in the applicant's favour, including the personal safety issues and his attempts to resolve personal relationship issues as canvassed above. However, on balance, the Tribunal has concluded, the circumstances in which the ground for cancellation arose outweighs the consideration of the other factors. The Tribunal is satisfied that the factors in favour of the cancellation of the visa outweigh the other considerations.

39. Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled.

40.

41. **DECISION**

42.

43. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

44.

Helen Kroger
Member